

**Alliance Bank Malaysia Bhd v
Century Land Resources Sdn Bhd & Ors**

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HIGH COURT (KUCHING) — SUIT NO 22–44 OF 2004-II
HAMID SULTAN JC
31 OCTOBER 2007

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Banking — Banker and customer — Claim for amount outstanding under banking facility — Claim for principal sum and interest under fixed loan facility and overdraft — Whether plaintiff entitled to vary interest rates of fixed loan and overdraft facilities — Whether guarantee was valid — Whether defendant's signature forged

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The plaintiff claimed against the first defendant as borrower and all other defendants as the guarantors for, inter alia, judgment for the principal sum and interest outstanding in respect of a fixed loan facility with interest and judgment for the principal amount and interest outstanding in respect of an overdraft facility with interest thereon. The defendants counterclaimed for, inter alia, a declaration that the plaintiff was not entitled to vary the rates of interest in respect of the fixed loan facility and the overdraft without the issuance of a notice in writing to the first defendant and/or charge an additional penalty interest and that the guarantee was invalid. The defence rested on two issues, ie that the plaintiff was not entitled to the whole sum claimed including interest which was varied several times, without notice to the first defendant; that the default interest was a penalty and there had been a forgery of the fourth defendant's signature, which released all the defendants from liability.

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Held, allowing the plaintiff's claim with costs and dismissing the defendants' counterclaim with costs:

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- (1) The court found no reason to disbelieve the evidence of PW1 and PW2, which was supported by contemporaneous evidence. The court also saw no reason to disbelieve any part of PW3's evidence that he was familiar with the stated transaction, could recognise the signatures of the second to fifth defendants and that he confirmed that the fourth defendant did sign the guarantee (see paras 9–11).
- (2) The fourth defendant did not create much doubt to the plaintiff's evidence. His evidence was evasive. Though he was involved in the

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- A signing of various documents relating to the facility as affirmed by the plaintiff's witness, he refused to admit his own signatures or was not able to identify them which were not in dispute in these proceedings. There was no reason to believe that the fourth defendant's signature was forged (see para 13).
- B (3) The plaintiff's evidence reflected that in the ordinary course of business, notices were issued even though each and every notice could not be produced. Further, the variation of interest would be reflected in the monthly statements and that there was no evidence to say the first defendant had objected to the variation. The defendants' contention that because the plaintiff could not establish that all notice of variations were not sent or received by the first defendant, they were not obliged to pay the varied interest was against contractual concept. The jurisprudence being that if one had breached a provision of a contract which only amounted to warranty they could claim damages and not necessarily seek to avoid the contractual obligation per se. There were notices of variations issued (see para 14).
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- D (4) Whether the 1% pa of default interest could be equated to penalty depended on the facts and circumstance of the case. In this instant case, the defendants failed to show that they were able to avail themselves of s 75 of the Contracts Act 1950 (see para 15(a)); *Malayan Banking Bhd v Chong Hin Trading Co Sdn Bhd & Ors* [2001] 6 MLJ 223 distinguished.
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- F (5) The issue of certificate of indebtedness clause of amount owing was not conclusive depended on the facts of the case. To show genuineness in such line of defence, the defendants must have adduced evidence to show that they had protested to the statement of accounts at the earliest opportunity and/or had adduced sufficient material before the court that the plaintiffs had erred in their calculation (see para 18).
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- H (6) Although the defence prima facie had merits, it was not supported by evidence. Further, the law on contract and the Specific Relief Act 1950 requires that a party who suffered loss or damage or intends to set aside a particular provision of a contract must challenge it at the earliest opportunity and must not acquiesce with the conduct and seek relief. Such relief would be denied if the complaint related to the Specific Relief Act 1950 which is discretionary in nature. In this case, the defendants were seeking declarations, which are only discretionary in nature (see para 19).
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[Bahasa Malaysia summary]

Plaintif menuntut terhadap defendan pertama sebagai peminjam dan

kesemua defendan-defendan lain sebagai penjamin-penjamin untuk, antara lain, penghakiman untuk jumlah prinsipal dan faedah yang belum dijelaskan berkaitan kemudahan pinjaman tetap dan penghakiman untuk jumlah prinsipal dan faedah yang belum dijelaskan berkaitan kemudahan overdraf dan faedah ke atasnya. Defendan-defendan telah menuntut balas untuk, antara lain, deklarasi bahawa plaintif tidak berhak untuk mengubah kadar-kadar faedah berkaitan kemudahan pinjaman tetap dan overdraf tanpa pengeluaran notis secara bertulis kepada defendan pertama dan/atau mengenakan penalti faedah tambahan dan bahawa jaminan tersebut adalah tidak sah. Pembelaan bersandarkan dua isu, iaitu bahawa plaintif tidak berhak terhadap keseluruhan jumlah yang dituntut termasuklah faedah yang telah diubah beberapa kali, tanpa notis kepada defendan pertama, bahawa faedah ingkar tersebut merupakan penalti dan terdapat pemalsuan tandatangan defendan keempat, yang melepaskan kesemua defendan-defendan daripada liabiliti.

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Diputuskan, membenarkan tuntutan plaintif dengan kos dan menolak tuntutan balas defendan dengan kos:

- (1) Mahkamah mendapati tiada sebab untuk tidak mempercayai keterangan PW1 dan PW2, yang disokong oleh keterangan semasa. Mahkamah juga mendapati tiada sebab untuk tidak mempercayai mana-mana bahagian keterangan PW3 bahawa dia mengetahui transaksi yang disebutkan, boleh mengenali defendan-defendan kedua hingga kelima dan bahawa dia mengesahkan bahawa defendan keempat telah menandatangani jaminan tersebut (lihat perenggan 9–11).
- (2) Defendan keempat tidak meninggalkan banyak kesan ke atas keterangan plaintif. Keterangananya bersifat mengelak. Meskipun dia terlibat dalam menandatangani pelbagai dokumen berkaitan kemudahan tersebut seperti yang disahkan oleh saksi plaintif, dia enggan mengakui tandatangannya sendiri atau tidak dapat mengenal pastinya yang tidak dipertikaikan dalam prosiding tersebut. Tiada sebab untuk tidak mempercayai bahawa tandatangan defendan keempat dipalsukan (lihat perenggan 13).
- (3) Keterangan plaintif menggambarkan bahawa dalam urusan biasa perniagaan, notis-notis dikeluarkan meskipun setiap dan semua notis tidak boleh dikeluarkan. Bahkan, perubahan faedah akan dinyatakan dalam penyata-penyata bulanan dan bahawa tiada keterangan untuk menyatakan defendan pertama membantah perubahan tersebut. Hujahan defendan-defendan bahawa oleh kerana plaintif tidak dapat membuktikan yang semua notis-notis perubahan-perubahan tidak dihantar atau diterima oleh defendan pertama, mereka tidak diwajibkan membayar faedah yang diubah adalah bertentangan dengan konsep

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- A kontraktual. Jurisprudensnya adalah jika seseorang telah melanggar peruntukan kontrak yang hanya membentuk waranti mereka boleh menuntut ganti rugi dan tidak semestinya memohon untuk mengelakkan obligasi kontraktual per se. Terdapat notis-notis perubahan yang dikeluarkan (lihat perenggan 14).
- B (4) Sama ada faedah ingkar 1% setahun boleh disamakan dengan penalti bergantung kepada fakta dan keadaan kes. Dalam kes ini, defendan-defendan telah gagal untuk menunjukkan bahawa mereka boleh menggunakan s 75 Akta Kontrak 1950 (lihat perenggan 15(a)); *Malayan Banking Bhd v Chong Hin Trading Co Sdn Bhd & Ors* [2001] 6 MLJ 223 dibeza.
- C (5) Pengeluaran klausa sijil keberhutangan tentang jumlah yang perlu dijelaskan tidak konklusif bergantung kepada fakta kes. Untuk menunjukkan ketulenan pembelaan, defendan-defendan hendaklah mengemukakan keterangan untuk menunjukkan bahawa mereka membantah penyata-penyata akaun tersebut seawal mungkin dan/atau telah mengemukakan bahan yang mencukupi di hadapan mahkamah bahawa plaintif-plaintif telah tersilap dalam pengiraan mereka (lihat perenggan 18).
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- E (6) Walaupun pembelaan tersebut secara prima facie mempunyai merit, ia tidak disokong oleh keterangan. Bahkan, undang-undang kontrak dan Akta Relief Spesifik 1950 menghendaki agar pihak yang mengalami kerugian atau kerosakan atau berhasrat untuk mengeneipkan peruntukan tertentu kontrak hendaklah mencabarnya seawal mungkin dan tidak patut bersetuju dengan perbuatan tersebut dan memohon relief. Relief sedemikian akan dinafikan jika aduan tersebut berkaitan Akta Relief Spesifik 1950 yang bersifat budi bicara. Dalam kes ini, defendan-defendan memohon deklarasi-deklarasi, yang bersifat budi bicara (lihat perenggan 19).]
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Notes

For cases on claim for amount outstanding under banking facility, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1809–1813.

H Cases referred to

- Asia Commercial Finance (M) Bhd v Regional Brilliance Sdn Bhd* [2002] 3 CLJ 638 (refd)
- Bank of Tokyo-Mitsubishi (M) Bhd v Sim Lim Holdings Bhd & Ors* [2001] 2 CLJ 474 (refd)
- I *Bumiputra Merchant Banker Berhad v The Melewar Corporation Bhd & 2 Ors* [1990] 2 CLJ 30 (refd)
- Ho Lai Ying (trading as KH Trading) & Anor v Cempaka Finance Bhd* [2004] 2 MLJ 197 (refd)

- MBf Finance Bhd v Magniglow Sdn Bhd* [1999] MLJU 490 (refd) A
Malayan Banking Bhd v Chong Hin Trading Co Sdn Bhd & Ors [2001] 6 MLJ 223 (distd)
Malaysia Building Society Bhd v Univein Sdn Bhd [2002] 7 MLJ 501 (refd)
OCBC Bank (M) Bhd v Lean Seng Pottery Factory Sdn Bhd [1999] 2 MLJ 402 (refd) B
Perwira Affin Bank Bhd v Orison Sdn Bhd & 2 Ors [2004] 1 AMR 442 (refd)
Pusat Bandar Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd [2000] 1 MLJ 513 (refd)
Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (in receivership) [1996] 2 MLJ 461 (refd) C
Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd [2004] 2 MLJ 31 (refd)

Legislation referred to

- Contracts Act 1950 s 75 D
 Specific Relief Act 1950
Susan Gan (Chan & Gan Associates) for the plaintiff.
Satinder Singh Sandhu (Sandhu & Co Advocates) for the defendants.

Hamid Sultan JC: E

[1] This is my judgment in respect of the plaintiff's claim against the first defendant as borrower and all other defendants as guarantors for facilities granted by the plaintiff as successor-in-title to Sabah Bank Bhd. F

[2] The plaintiff's claim against the defendants, inter alia, are as follows:

- (a) judgment for the sum of RM2,354,805.83 as at 26 February 2004 being the principal sum and interest outstanding in respect of the fixed loan facility with interest thereon at the rate of 2.5% per annum above the base lending rate (which is presently at 6.0% per annum) ('prescribed rate') calculated on monthly rests basis and a further interest of 1.0% per annum above the prescribed rate, calculated on a monthly rests on the total instalments in arrears from 26 February 2004 until full and final payment; and G H
- (b) judgment for the sum of RM2,354,805.83 as at 26 February 2004 being the principal sum and interest outstanding in respect of the fixed loan facility with interest thereon at the rate of 2.5% per annum above the base lending rate (which is presently at 6.0% per annum) ('prescribed rate') calculated on monthly rests basis and a further interest of 1.0% per annum above the prescribed rate, calculated on a monthly rests on the total instalments in arrears from 26 February 2004 until full and final payment. I

- A** [3] The plaintiff also claims against the second to fifth defendants as guarantors under a joint and several guarantee dated 21 August 1997 purportedly executed by them ('the said guarantee') for the above amounts together with interest and costs.
- B** [4] The defendants have counterclaimed for various reliefs, inter alia, they are as follows:
- C** (a) a declaration that the plaintiff is not entitled to vary the rates of interest in respect of the fixed loan facility and the overdraft without the issuance of a notice in writing and the service of such notice upon the first defendant and/or to charge an additional penalty interest at 1% per annum above the prevailing rate of interest on the amount due; and
- (b) a declaration that the guarantee is invalid etc.
- D** UNDISPUTED FACTS
- [5] The facts stated below are not disputed:
- E** (i) the first defendant accepted the banking facilities offered by the plaintiff under the letter of offer dated 6 May 1997.
- (ii) the first defendant also executed a loan agreement cum deed of assignment dated 21 August 1997.
- F** (iii) the first defendant also executed a memorandum of charge instrument No L 2069/2000 dated 13 January 2000 to secure the banking facilities.
- (iv) the second, third and fifth defendants executed the said guarantee dated 21 August 1997. But, the fourth defendant asserts that he did not sign it and his signature thereon was forged. The second, third and fifth
- G** defendants assert that they are discharged from the said guarantee since it was not signed by the fourth defendant.
- (v) the plaintiff advanced sums under the banking facilities and the first
- H** defendant defaulted in the payment of sums due and payable. As a consequence, the plaintiff issued separate letters of demand to each of the defendant dated 19 March 2004 claiming for the sums prayed for under this action. The defendants assert that this letter of demand is unlawful as it included sums to which the plaintiff was not lawfully entitled.
- I** [6] In brief, the defence of the first defendant rests on mainly two issues:
- (a) that the plaintiff is not entitled to the whole sum claimed as stated in the statement of claim as the same included interest, which were varied at various points in time, without notice to the first defendant; and

(b) the plaintiff is not entitled to charge the 1% per annum default interest as the same is a penalty. A

The defence of the second to fifth defendants relies on the same grounds as above. In addition, the second to fifth defendants claim that by reason of the forgery (alleged) of the signature of the fourth defendant on the joint and several guarantee dated 21 August 1997, the second to fifth defendants are released from liability. B

[7] The agreed issues to be tried basically relates to the above issues which I have stated briefly and in consequence it is not necessary for me to set it out in any further detail. C

[8] The plaintiff called four witnesses to establish their case. Two of them were advocates and solicitors. The fourth and fifth defendants gave evidence and called a handwriting expert to give evidence that the fourth defendant's signature in the letter of guarantee was forged. D

[9] I have gone through the witness statement of PW1 and PW2 who gave evidence on behalf of the plaintiff to establish the case for the plaintiff, as per the statement of claim. I find no reason to disbelief their evidence which is supported by contemporaneous document. E

[10] PW3 who was also a commissioner of oaths had confirmed that he was acquainted with the second to fifth defendants and have also acted for the second defendant and his family and the companies controlled by his family in a few conveyancing transactions, and on numerous occasions they had affirmed or sworn before him statutory declarations, and one such business is that in respect of the first defendant. In consequence, he says he is familiar with the same transaction relating to case herein and can recognise the signatures of the second to fifth defendants. Very importantly, he says in his witness statement WSPW3 that: F
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11 At the request of the second defendant and the said Wung Heok Hoi, I also assisted the second to fifth defendants in drawing up a statutory declaration to be signed by the second to fifth defendants, being the directors of the first defendant, as the intended guarantors of the banking facilities granted by Sabah Bank to the first defendant. A copy of the statutory declaration is at p 21 of DB. This statutory declaration was drawn up after the first defendant had received Sabah Bank's letter of offer dated 6 May 1997. This is clear from the statutory declaration itself, which refers to the letter of offer dated 6 May 1997. H
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The said statutory declaration was affirmed by each of the second to fifth defendants personally before me as a commissioner for oaths on 12 June 1997. On attesting their signatures, I affixed my seal to the same.

- A** 12 I am aware that from previous affidavits filed herein by the fourth defendant that the fourth defendant has now alleged that he did not sign the statutory declaration. This allegation by the fourth defendant is untrue as he had signed the same before me.
- B** 13 By signing the said statutory declaration whereby he had declared that he is one of the intended joint and several guarantors in respect of the banking facilities totaling RM3.24m granted by Sabah Bank to the first defendant, the fourth defendant would have known very well that he was required to be a guarantor for the banking facilities approved by Sabah Bank under the letter of offer dated 6 May 1997.
- C**
- D** 14 Further, the fourth defendant, being one of the directors of the first defendant, and who signed the Board of Directors' Resolution at p 22 of PB, would have been aware of Sabah Bank's letter of offer dated 6 May 1997 and the requirement therein that he, together with the three other named directors of the first defendant, provide a joint and several guarantee for the banking facilities granted by Sabah Bank to the first defendant.
- Prima facie, I do not see any reason to disbelieve any part of his evidence.
- E**
- [11] PW4 in his evidence without any doubt confirms that the fourth defendant did sign the guarantee and also explains why the confusion has arisen. This part of the evidence in his witness statement WSPW4 reads as follows:
- F**
- G** 15 I am aware from previous affidavits filed herein by Mr Wung Ann Hoi that Mr Wung Ann Hoi, the fourth defendant, has now alleged that he did not sign the said guarantee before me. This allegation is not true. Mr Wung Ann Hoi did, as one of the guarantors required under the letter of offer dated 6 May 1997, sign the said guarantee before me some time after I was supplied with the said statutory declaration. I had attended to his execution of the said guarantee. In accordance with my established practice in attesting signing of documents, I had asked for and checked his identity card and confirmed the identity of Mr Wung Ann Hoi before he signed the said guarantee. In accordance with my established office practice, I had caused a photocopy his identity card to be made for our office file record, a copy of which is at p 7 of AB.
- H**
- I** 16 For the reason that Mr Wung Ann Hoi himself signed the said guarantee before me, the allegation of forgery by Mr Wung Ann Hoi is not true at all. The fact that he has lodged a police report alleging that his signature had been forged does not make that allegation true.
- 17 From the affidavits filed previously in this action by the fourth defendant, it appears that the fourth defendant's reason for saying that

he could not have signed the said guarantee is because he claims that the said guarantee would have been signed before 6 June 1997 and that he was away overseas from 30 May 1997 to 5 June 1997. This date of 6 June 1997 is the date of an Invoice issued by Messrs Hamzah & Ong Advocates for fees pertaining to the legal documentations for the banking facilities.

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Prima facie, I have no reason to disbelieve any part of his evidence.

[12] On the part of the defence, the forensic document analysis evidence attempts to support the fourth defendant's allegation. His findings read as follows:

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16Q: What are your findings?

A: As stated on page 4 of my report, based on the sixteen differences, I conclude that signature of Wung Ann Hoi on guarantee dated 21 August 1997 is of different authorship from the specimen signatures. It is a copied signature.

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During cross-examination, it was established that the expert had relied on a photocopy of specimen signature and that there could be variation in signatures. That part of the evidence reads as follows:

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Q: To analyse the strength, do you agree that you need the original document?

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A: Not necessary. Can examine on a good photocopy.

Q: Whether you agree for analysis purposes, the document submitted to you as specimen must be dated at the same time as the questioned document?

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A: Preferably but not necessary.

Q: Encl 200 page 168 and also 173?

A: 3.91 refers to month of March, year 1991 and so on. This date is obtained from the document.

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Q: One signature cannot be a perfect match to another?

A: Yes.

Q: Do you agree that there will always be slight variation or discrepancies?

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A: Yes.

Q: Do you agree that even the specimen signatures given to you vary from one to another?

A A: Yes.

Q: Were you given the original copy of the guarantee?

A: Yes.

B Q: Apart from guarantee and the specimen signatures you were not given any other documents for analysis?

A: Yes.

No further cross-examination.

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[13] The fourth defendant other than stating that he did not sign guarantee and had lodged a police report sometime in 1992, did not create much dent to the plaintiff's evidence. Further, the fourth defendant in cross-examination on several occasions says he is not sure whether it is his signature and cannot remember various documents signed by him. That part of the evidence reads as follows:

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Q: I want to show you a letter of offer from the plaintiff dated 22 July 1999 — the 2nd signature belongs to you?

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A: I do not agree.

Q: I refer to page 69 — encl 200. The 2nd signature which appears on the right belongs to you?

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A: I am not sure whether it is my signature or not.

Q: The second signature which appears at the bottom, is that your signature?

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A: I am not sure. I have forgotten.

Q: I put it to you that the letter of offer and resolution and the letter dated 27 July 1999 page 69–70 was signed by you?

A: I do not agree because I am not sure.

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Q: You wrote to the bank many times for the first defendant to pay arrears out of the schedule?

A: I cannot remember.

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Q: Did you ever write to the bank to delay payment?

A: Yes.

Q: When was that?

A: I can't remember.

Q: Pages 109 and 110, these are two cheques given to the bank for payment of banking facilities? A

A: I am not sure.

Q: Page 112 — This letter is the letter to the bank to state that request the bank to delay payment? B

A: Yes. This letter was signed by me.

Q: Pages 151 and 152 — Does it belong to you?

A: I am not sure. C

Q: Do you agree that this document was submitted to the Bank for the first defendant to obtain facilities?

A: I do not know because I was not involved because I was not a shareholder. D

Q: I refer to pages 148–150 these documents were also submitted to the bank for the first defendant facilities. You were at all material time a director — Application as well as release?

A: 1977 to 1999 only as appointed Director. February 1997. E

No further cross-examination.

No re-examination.

Witness to be discharged. F

It is my finding that the fourth defendant's evidence was evasive. Though he was involved in the signing of various documents relating to the facility as affirmed by the plaintiff's witness, he refused to admit his own signatures or is not able to identify his own signatures which are not in dispute in these proceedings. After having heard the evidence of the defendants, I have no reason to believe that the fourth defendant's signature in the guarantee was forged. G

[14] On the issue that the plaintiff cannot vary the interest without giving the notice to the first defendant, the plaintiff's evidence reflected that in the ordinary course of business, notices are issued even though each and every notice cannot be produced. Further, the variation of interest will be reflected in the monthly statements and that there was no evidence to say the first defendant had objected to the variation. The defendants contended that because the plaintiff cannot establish that all notice of variations were not sent or was not received by the first defendant they are not obliged to pay the varied interest. In my view, such an argument is against contractual concept. The jurisprudence being that if you breach a provision of a contract which only amounts to warranty you claim damages and not necessarily seek to H
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A avoid the contractual obligation per se. There are many decisions which give expression to this legal jurisprudence without referring to contractual concepts. Some of them are as follows:

B (i) In *OCBC Bank (M) Bhd v Lean Seng Pottery Factory Sdn Bhd* [1999] 2 MLJ 402, the defendant raised the issue that the plaintiff had failed to notify the chargor of the variation of the interest by notice in writing. The court held that it is sufficient for the bank's monthly statement sent to the chargor to notify the periodical variations in the interest rate and there had been no complaint by the chargor that they had not received the notices or the monthly statements sent to their address (see *Bank of Tokyo-Mitsubishi (M) Bhd v Sim Lim Holdings Bhd & Ors* [2001] 2 CLJ 474).

D (ii) In *MB Finance Bhd v Magniglow Sdn Bhd* [1999] MLJU 490, the court observed:

E The defendant admitted being informed of the monthly interest payable — see para 10 of affidavit in opposition. It can be seen from exhs WSD-1A, WSD-1B and WSD-1C that amount of each monthly interest charged was different and each amount tendered by the defendant varied accordingly and was sufficient to cover payment. There had been four variations of the interest rate from 1 July 1997 to 31 October 1997 (see particulars of base lending rate para 12 of affidavit in opposition) and the defendant paid all the monthly interest. From exhs WSD-1A, WSD-1B and WSD-1C, the figures in the right column are the monthly balances on which interest for the subsequent month was computed. No complaints at all by the defendant that the balances were wrong despite having received the statements of account.

G (iii) In *Asia Commercial Finance (M) Bhd v Regional Brilliance Sdn Bhd* [2002] 3 CLJ 638, the court observed:

H Since the parties have executed the charge documentation, they are bound by the terms therein. Paragraph 4(1) of the annexure to the charge permits the variation of interest by the plaintiff by a mere unilateral act of serving a notice in writing on the defendant as chargor. Be that as it may, in the instant case, the defendant has actually applied to and requested the plaintiff for a moratorium as alluded to above and the parties have concretised their own rights and obligations in the manner as adumbrated above, in which event, I am of the view that the variation of interest and the terms and conditions therein are valid and legally enforceable.

I It is my finding in this case that there were notices of variations issued and this is not a case where no notice at all of variations was issued as the defendants attempt to make out the case.

[15] On the issue whether 1% per annum of default interest can be equated to penalty depends on the facts and circumstance of the case. In this case the plaintiff says:

- (a) In *Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In receivership)* [1996] 2 MLJ 461, the Federal Court held that default interest may or may not be a penalty depending on the circumstances. What therefore are those circumstances? With specific reference to the Federal Court case aforesaid and s 75 of the Contracts Act 1950 ('CA 1950'), the circumstances were succinctly set out in the case of *OCBC Bank (Malaysia) Bhd v Livision Sdn Bhd* [1998] MLJU 497 where the learned judge said that:

So, stipulations providing for default interest at one and one-third times the normal rate (*Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In receivership)*), at more than six times the normal rate (illustration (d) of s 75 of the Contracts Act 1950) and for it to be retrospective (*Sundar Koer v Sham Krishen*) are void and unenforceable because they are exorbitant (*Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In receivership)*). In the present case the default interest that was charged ... is only 1% pa on the amount in excess and to be charged from the time of default. Therefore, on the rate alone it cannot be said to be exorbitant and the stipulation cannot therefore be regarded as a penalty. There is therefore, no merit on this ground.

The court further found that the imposition of such an interest was the norm rather than an exception and if the plaintiffs had acted under the provision of the agreement between the parties, the defendant would not be heard to complain. The court also found that the imposition of a 1% additional interest cannot today amount to a penalty.

- (b) In the Court of Appeal case of *Pusat Bandar Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd* [2000] 1 MLJ 513, Siti Norma Yaakob JCA held that, 'to bring increased or penalty interest within the ambit of s 75 of the Contracts Act 1950, it must first be shown that it was excessive in nature. The fact that it was an agreed penalty interest as opposed to one that has been imposed unilaterally by the appellant lent support to the conclusion that it could not have been excessive to enable the respondent to agree to that rate of interest to be charged. On that reasoning, the respondent could not now be heard to complain that the rate was excessive and, under those circumstances, that rate of interest could not be caught by s 75' (see *Malaysia Building Society Bhd v Univein Sdn Bhd* [2000] 7 MLJ 501, *Bumiputra Merchant Banker Berhad v The Melewar Corporation Bhd & 2 Ors* [1990] 2 CLJ 30 and *OCBC Bank (M) Bhd & Anor*).

- A (c) Based on the aforesaid authorities, the defendants have failed to show that they are able to avail themselves of s 75 of the Contracts Act 1950.

- B [16] On the issue of penalty, the defendants rely on the case of *Malayan Banking Bhd v Chong Hin Trading Co Sdn Bhd & Ors* [2001] 6 MLJ 223. In that case, the loan offer and the memorandum of charge executed by the borrower (first defendant) included a term allowing the plaintiff to charge a penalty interest of 1% per annum. One of the issues before the court was whether the penalty interest was contrary to s 75 of the Contracts Act 1950.
- C In holding that the provision on interest was a penalty and unenforceable, Abdul Wahab Patail J said at p 230:

- D In this case the 1% interest in the memorandum of charge is clearly described as penalty interest in the letter of offer, slightly less obvious in the memorandum of charges themselves, but any doubt is dispelled by the treatment and description of the payment as a penalty interest in the solicitors letter of demand, the certificate of Chai Su Boon and the statement attached thereto. Therefore any submission whether it is a penalty or liquidated damages is an exercise in futility. As a penalty interest, the effect of s 75 is to require the plaintiff to prove his damages and the 1% operates as the upper limit that may be claimed as damages. But as explained
- E in *Selva Kumar Murugiah v Thiagarajah Retnasamy*, the plaintiff must prove the damages that he suffered, the established measure for which is the damage for the loss of use of the fund or money.

- F [17] I take the view that the facts of *Malayan Banking Bhd* and this case is different.

- G [18] Finally on the issue of certificate of indebtedness clause of amount owing is not conclusive as argued by the defendants, in my view depends on the facts of the case. Support for the proposition that certificate of indebtedness is not conclusive proof of the debt can be garnered from many cases, to name a few are as follows: (i) *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31, (ii) *Ho Lai Ying (trading as KH Trading) & Anor v Cempaka Finance Bhd* [2004] 2 MLJ 197, (iii)
- H *Perwira Affin Bank Bhd v Orison Sdn Bhd & 2 Ors* [2004] 1 AMR 442. To show genuineness in such line of defence, the defendants must adduce evidence to show that they have protested to the statement of accounts at the earliest opportunity and/or have adduced sufficient material before the court that the plaintiffs have erred in their calculation.

- I CONCLUSION

[19] In conclusion, I will say that though the defence of the defendants prima facie shows it has merits, it is not supported by evidence. Further, the

law on contract and Specific Relief Act 1950 requires a party who suffered loss or damage or intends to set aside a particular provision of a contract must challenge it at the earliest opportunity and must not acquiesce with the conduct and seek relief. Such relief will be denied if the complaint is related to Specific Relief Act 1950 which is discretionary in nature. In this case, the defendants are seeking declaration, which are only discretionary in nature.

[20] In the premise, I allow the plaintiff's claim with costs to the plaintiff and dismiss the defendants' counterclaim with costs to the plaintiff. The getting-up fees for both the claim and the counterclaim in total should not exceed RM100,000. If costs cannot be agreed, the plaintiff can tax their costs. The order of this court shall be settled before the deputy registrar/senior assistant registrar. I hereby order so.

Plaintiff's claim allowed with costs. Defendant's counterclaim dismissed with costs.

Reported by Chew Phye Ken

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